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No. 252

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

ALLEN-BRADLEY LOCAL No. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, ET AL., APPELLANTS,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY, RESPONDENTS.

BRIEF AMICUS CURIAE OF WISCONSIN STATE FEDERATION OF LABOR.

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WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY, RESPONDENTS.

BRIEF AMICUS CURIAE OF WISCONSIN STATE FEDERATION OF LABOR.

The Wisconsin State Federation of Labor submits this brief *amicus curiae* because of the vital and direct interest of organized labor in the State of Wisconsin in the questions involved in this case.

The passage of the reactionary legislation known as the Wisconsin Employment Peace Act (Ch. 111, Stats. 1939), the provisions of which are now before this Court for review in the instant matter, has done more to disrupt the collective bargaining process in the State of Wisconsin than any other single factor since its passage. That this has resulted in a burden upon interstate commerce necessarily follows, since there are many communities in Wisconsin, such as

Milwaukee, which furnish to the world many different brands and types of machinery and machine products. Restrictive provisions of the law have been used as a club over employees and labor organizations, with the result that the national policy of the United States as declared in the Norris-LaGuardia Act and the National Labor Relations Act has been thwarted and suppressed. And while a decision of this Court invalidating the Wisconsin Employment Relations Act as it applies to employers and employees within the jurisdiction of the National Labor Relations Act will not entirely relieve organized and unorganized labor of the restrictive provisions of that law, at least it will result in freeing a large percentage. That then constitutes the interest of the Wisconsin State Federation of Labor in these proceedings.

Summary of Argument.

This brief will be directed to the following points and argument:

1. It will demonstrate the principal error of the court below, that is, its failure to appreciate that the issue in the instant case is one of *legislative power* rather than *administrative inconsistency*, that the issue is whether or not the State Board *may* exercise jurisdiction rather than *how* it has exercised it.

2. The remainder of the brief will be directed to the salient points of irreconcilable conflict between the National and State Acts here involved.

1.

The Error of the Court Below.

Examination of the decision of the court below will demonstrate that such decision is based upon that court's opinion that whether or not State legislation applicable

to subjects covered by national legislation may validly coexist with such national legislation does not depend upon any conflict in terms, but rather upon a conflict in administration. In the court's decision, 237 Wis. 164, at 179, can be found the statement:

> "The vital question for consideration in this case is not whether there is repugnancy in the language of the two acts, but is one of jurisdiction between the State and Federal Governments. * * *"

And at page 184:

> "Conflict between the two acts can arise only with respect to orders issued by each of the Boards dealing with the same situation. * * *"

This holding of the court below did not and does not meet the contentions of the appellants in the instant proceeding.

Throughout these proceedings both before the Board and the court below, the appellants challenged, on constitutional grounds, legislation creating jurisdiction in the Wisconsin Board over the labor relations of an employer who is admittedly subject to the National Labor Relations Act. Appellants urged and now urge that the legislative attempt to create a board with jurisdiction over industries in interstate commerce is void because the statute creating the board is repugnant to the National Labor Relations Act. Appellants assert that the Wisconsin Legislature has exceeded constitutional limits in its effort to extend the jurisdiction of the Wisconsin Board over employers in interstate commerce such as the respondent company.

This contention goes to the question of *legislative power*. It does not raise questions of conflicts in *administration* between State and national administrative agencies. The difference is vital, but was completely overlooked and ignored by the court below.

When Congress, under its plenary power over commerce, entered the field of labor relations, the question immediately and necessarily arose as to the effect of that Congressional act upon the powers of State legislatures in the same field. Usually, the first claim made in such cases is that Congress has pre-empted the field, thus precluding any and all similar legislation by State bodies. That the commerce power of the Federal Government is paramount to and can supersede all State legislation is a securely fixed and undisputed principle of constitutional law. *Gibbons* v. *Ogden*, 9 Wheat. 1. However, it is equally undisputed that Congressional action need not necessarily be exclusive (*Houston* v. *Moore*, 5 Wheat. 1). The determining factor distinguishing between these two alternatives is the "intent of Congress." *Leisy* v. *Hardin*, 135 U. S. 100, 10 Sup. Ct. 681.

We do not in this brief discuss the question of whether or not the Federal Congress has by the adoption of the National Labor Relations Act pre-empted the field of labor relations to the exclusion of any action of the State. We do not view this case as a case dealing with the question of pre-emption, since even if Congress had not pre-empted the field, it would, nevertheless, be outside the authority of the State Legislature to pass inconsistent legislation covering matters in the field covered by the Federal legislation. If Congress had pre-empted the field, then the State could not validly pass any legislation dealing with the same subject matter in so far as its application to interstate commerce is concerned. Where Congress has not pre-empted the field, the State may pass supplementary legislation. *However, a failure to pre-empt the field does not give to States the right to pass any legislation dealing with the same subject matter. The legislation which is passed must be consistent with and not repugnant to the national legislation.* Therefore, even if we were to concede

in the instant case that the Congress has not pre-empted the field, we, nevertheless, have the right to challenge the instant legislation. While under such circumstances we might not challenge the power of the legislature of the State of Wisconsin or any other State to pass labor relations laws, we may, nevertheless, challenge the passage by the legislature of the State of Wisconsin of a particular law, namely, the Wisconsin Act of 1939, on the ground that such particular law is repugnant to the National Labor Relations Act.

To state it otherwise: In some instances a Congressional enactment prevents the State from passing any laws on the subject. Where, however, the power of the State to pass laws on the same subject is not wholly removed, it still may not enact laws on the subject which are repugnant to the Congressional enactment. *Cloverleaf Butter Company* v. *Patterson*, 86 L. Ed. Advance Opinions 486 (decided February 2, 1942).

Both the majority and the dissenting opinions in the *Cloverleaf* case, *supra*, recognizes that simple proposition of law. In the majority opinion, it is stated:

> "But where the United States exercises its power of legislation so as to conflict with a regulation of the State, either specifically or by implication, the *State legislation becomes inoperative* and the Federal legislation exclusive in its application." (Emphasis ours.)

In the dissenting opinion by Mr. Chief Justice Stone it is pointed out that an enactment of Congress will "strike down a State statute" if such State Act "*in terms* or in its practical administration, conflicts with the Act of Congress or plainly and palpably infringes its policy." (Emphasis ours.) Both of such statements are buttressed by ample citation of authority.

The pertinent point is the holding of this Court that the State legislation "becomes inoperative" or "is struck

down." Obviously then, where legislation of the State is on its face repugnant to the policy, terms and administration of the National legislation, the question is not whether the State enforcement agency will ignore such repugnancy but rather whether the State agency *may in the first instance assume jurisdiction over the matter.* It is not a question of administrative conflict, but a question of legislative power.

It is clear under the cases that if the Wisconsin legislature has passed an act that is repugnant to the National Act, then the manner and method of administration by the State Board is wholly irrelevant. Indeed, we may go so far as to state that, even should the State Board, in cases involving employers who are subject to the National Act, attempt to administer the Act in such a way as to avoid conflict with administration of the National Board, it would still not save the validity of such a State statute. For obviously, no administrative jurisdiction that is created unconstitutionally can be exercised in any manner—constitutionally or otherwise. IN LEGAL CONTEMPLATION, SUCH A JURISDICTION WAS NEVER CREATED. AN UNCONSTITUTIONAL, VOID LEGISLATIVE EFFORT CANNOT, LEGALLY, ESTABLISH ANY JURISDICTION WHATEVER.

In brief, the question of conflict in administration is irrelevant to the disposition of the basic issue in this case.

This Honorable Court states the true issue in the following language:

> "The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power, IN VIEW OF ITS NATURE AND OPERATION, MUST BE DEEMED TO BE IN CONFLICT WITH THIS PARAMOUNT AUTHORITY." (Emphasis supplied.) (*National Labor Relations Board* v. *Jones & McLaughlin Corporation*, 301 U. S. 1, 57 Sup. Ct. 615.)

Similarly, in the case of *Houston* v. *Moore, supra,* Mr. Justice Story stated:

> "* * * It is not to be admitted that a mere grant of such powers in affirmative terms to Congress does per se transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states, unless where * * * there is a direct repugnancy or incompatibility in the exercise of it by the states."

See, also, *Gulf, Colorado and Santa Fe Ry.* v. *Hefley & Lewis,* 158 U. S. 98, 15 Sup. Ct. 802.

In other words, the basic question is whether or not there is conflict between the enactments of the National and State Legislatures. It does not, in this case at least, embrace the problem of conflicting administration of similar acts.

The Conflict Between the Two Statutes.

Appellants' brief sets forth in elaborate detail the conflicts in the provisions of the State and National Acts. There is no need, therefore, further to impose upon the time of this Court by a detailed reiteration of those conflicts. Instead, we shall attempt, by a few illustrations, to indicate the basic and inescapable repugnance between the two Acts.

The formula for ascertaining the existence of that degree of repugnance which would render the State Act unconstitutional as applied to industries subject to the National Act has been set forth in the case of *Gulf, Colorado and Santa Fe Ry.* v. *Hefley & Lewis, supra:*

> "The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement MAY expose a party to a *conflict*

of duties. It is enough that two statutes operating on the same subject matter prescribed different rules." (Emphasis ours.)

Special emphasis should be placed on the use of the word "may" in the above quote since the respondent argues that even though there is a conflict, the statute is not subject to attack until the National Law is put into operation. It is further argued that in such event, all that must be done is to ignore the State Law and the result of the proceedings under it. (The conflict is admitted to exist in the definition of the term "employee" and in the rights granted to such "employee" under the State and Federal Law, as well as in the duties owing by the employer to such "employee" under each law.)

It must be apparent from the cases already cited and from the above quotation in the *Gulf* case that where the very laws are in conflict, the State Law, in so far as it embraces the same field as the National Law, is absolutely null and void. IT CANNOT CONTINUE TO HAVE VALIDITY UNTIL SUCH TIME AS ACTION IS TAKEN UNDER THE NATIONAL LAW. The National Act is the supreme law of the land and inconsistent legislation cannot co-exist with it.

Fundamentally, the conflict in the duties imposed on the employers and the rights granted to employees by the two Acts arises from the all important difference between the definitions of the term "employees" as contained in both Acts. Section 2 (3) of the National Act defines that term as follows:

> "The term 'employees' shall include any employee, and shall not be limited to the employees of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice,

and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

Section 111.02 (3) of the Wisconsin Act, on the other hand, defines that term as follows:

"The term 'employee' shall include any person, other than an independent contractor, working for another for hire in the State of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or his representative, (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employee who is subject to the federal railway labor act."

Since both definitions contain the term "labor dispute", it is necessary, too, to point out the difference between the definitions of that term in the two Acts. Section 2 (9) of the National Act defines that term as follows:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Section 111.02 (8) of the Wisconsin Act, on the other hand, defines that term as follows:

> "The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

That the vast difference in the definition of "employees" must inevitably—by operation of legislative language as distinguished from anything the administrators may do—lead to a "conflict of duties" is readily demonstrable. This grows out of the fact that both Congress and the State have granted in their labor relations acts rights to EMPLOYEES, within the meaning of those words as defined in those acts, and imposed duties on employers owed to such EMPLOYEES.

For example: Section 7 of the National Act grants to "employees" the right to "bargain collectively through representatives of their own choosing."

To facilitate the exercise of that basic right Congress has created in Section 9 of its Act administrative machinery

whereby the employees' choice of a bargaining representative may be ascertained.

Finally, to give effective substance to that right, Congress, in Section 8 (5) of its Act, has imposed upon every employer the duty "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

Similarly, Section 111.04 of the Wisconsin Act grants to "employees" the right to "bargain collectively through representatives of their own choosing."

To facilitate the exercise of that basic right, the Wisconsin Act has created in Section 111.05 administrative machinery whereby the employees' choice of a bargaining representative may be ascertained.

Finally, to give effective substance to that right, the Wisconsin Act, in Section 111-06(1)(d), has imposed upon every employer the duty "to bargain collectively with the representative of a majority of his employees in any collective bargaining unit."

Thus, both Acts establish for employees a clear and precise statutory right and impose upon employers a clear and precise correlative statutory duty.

The respondent in the instant case, who is admittedly subject to the National Act, is under obligation to perform the duties imposed both by the National and State Acts. But his "EMPLOYEES" are not the same within the meaning of both Acts, and, therefore, it is impossible for him consistently to fulfill both of these duties.

Let us illustrate: Suppose a not unusual rival union situation wherein fifty-one workers in a plant of one hundred have designated Union A to represent them as their collective bargaining agent, and the remaining forty-nine have designated Union B.

Suppose, further, that five of the members of Union A have ceased their employment as a consequence of a dispute

with their employer over their wages, although a majority of the employer's employees are satisfied with their wages and have no dispute with the employer regarding them. By leaving their work for that reason, these five employees automatically lose their status of employees under Sections 111.02 (3), 111.02 (8) and 111.06 (2) (e) of the Wisconsin Act. Hence, under the operation of the Wisconsin law, there would now be forty-nine employees who have designated Union B and forty-six employees who have chosen Union A. Accordingly, by operation of Section 111.06 (1) (d), the employer would have to bargain EXCLUSIVELY with Union B.

However, those same five employees would retain their employee status under Sections 2 (3) and 2 (9) of the National Act. Therefore, so far as the National Act applies, there would still remain the original fifty-one selecting Union A and forty-nine preferring Union B. There would still remain, too, the statutory obligation (Section 8 (5)) on the part of the same employer to bargain EXCLUSIVELY with Union A. In other words, the one employer would be confronted with the impossible task and duty of bargaining EXCLUSIVELY with two different bargaining agents. It is unnecessary for us to multiply the available illustrations demonstrating this and similar conflicts. A conflict in a right and duty so basic to the scheme of both Acts is in itself sufficient to render the State Act constitutionally inapplicable to a business that is subject to the National Act.

The same result would follow if there were no rival union. In the above example Union A, as the result of the strike (under the definition of "employee" or under the provision of Section 111.06 (2) (e), if the dissatisfied employees wanted to state the reasons for the strike) would no longer represent a majority of "employees." Under

the provisions of Section 111.06 (1) (e) it would be an unfair labor practice for the employer to bargain collectively with the union under such circumstance. Under the provisions of Section 8 (5) of the National Labor Relations Act it would be an unfair labor practice if he refused to bargain collectively and in good faith with the same union!.

Having referred to the conflict in duty to bargain collectively, it is well to point to Section 111.06 (1) (e) of the Wisconsin Act as a further indication of the inherent repugnance of the State Act to the National Act. The Federal Government has declared it to be its express policy "to encourage collective bargaining." It nowhere limits the meaning of the phrase "collective bargaining" to bargaining with a representative designated by a majority.

In effect, Congress has found collective bargaining with bargaining agents of minority groups—at least until a majority representative has been designated—to be necessary to safeguard "commerce from injury, impairment, or interruption, and to promote the flow of commerce. * * *" In spite of this Congressional finding and the legislation Congress has enacted as a consequence thereof, the State of Wisconsin has expressly enjoined employers who are engaged in interstate commerce from bargaining collectively "with the representatives of less than a majority of his employees." (See also, in this respect, the case of *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, affirming, under the National Act, the right of an employer to bargain with the representative of less than a majority of its employees, and commending it for having done so.)

It is not amiss, in view of the decision of the Wisconsin Supreme Court in the case of *Hotel & Restaurant Employees' International Alliance, Local No. 122, et al.* v. *Wis-*

consin Employment Relations Board, et al., 295 N. W. 634, to point to one further example of irreconcilable conflict between the National and State Labor Relations Acts.

Congress has declared it "to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate those obstructions when they have occurred * * * by protecting the exercise by workers of full freedom of association, self-organization, * * * for the purpose of negotiating the terms and conditions of their employment OR OTHER MUTUAL AID OR PROTECTION."

As a concrete expression of this declared policy, Congress, in Section 7 of the National Act, has provided that "employees shall have the right * * * to engage in CONCERTED ACTIVITIES for the purpose of collective bargaining or OTHER MUTUAL AID OR PROTECTION."

Here, beyond any room for dispute or cavil, is granted to employees the fundamental substantive right "to engage in concerted activities" for their mutual aid or protection. This right is nowhere and by no means limited to concerted activities pursued after a strike has been voted by a majority of the employees in a collective bargaining unit in a secret ballot. On the contrary, Congress could not, even if it so desired, constitutionally limit that right to a majority group. *Thornhill* v. *State of Alabama*, 310 U. S. 88, 84 L. Ed. 1093.

However that may be, the right of minorities to strike, picket and boycott for their mutual aid is granted by Congress in the exercise of its plenary power to regulate interstate commerce. That being so, the State cannot, under guise of exercising its police power, or on any other pretext, thwart that Congressional design by removing from minority groups of employees the right to engage in those ac-

tivities. Accordingly, Section 111.06 (2) (e) of the Wisconsin Act, which deprives minority groups of the right to engage in "picketing, boycotting or any other overt concomitant of a strike, unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike," too, represents a profound and irreconcilable conflict with the National Act and cannot under elementary constitutional principles be applied to the employees of an employer that is subject to the National Act.

The *Hotel* decision of the Wisconsin Court also is in direct conflict with the provision of the National Act that:

> "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike". (Sec. 13.)

Under the decision of the Wisconsin Supreme Court, the State Act has divided strikes into "authorized" and "unauthorized", and has validly prohibited the peaceful concerted activities required to make a strike effective. This results in those cases where the majority of employees have not licensed the strike by secret ballot. The right to strike which is preserved in the National Act is, therefore, denied under the State Act.

Many other examples of conflict come to mind. However, in view of the extended treatment given this subject in appellant's brief, further extension of this brief seems unnecessary.

Conclusion.

It is respectfully submitted that the Wisconsin Board had no jurisdiction over this case, and that the court below erred in enforcing the order of the said Board. The Wisconsin State Federation of Labor respectfully requests this Honorable Court to reverse and set aside the judgment of

the Circuit Court of Milwaukee County as affirmed by the Supreme Court of the State of Wisconsin, and to declare unconstitutional and void Chapter 111, Wis. Stats. 1937, with respect to any attempted application of such statute to employers and employees subject to the National Labor Relations Act.

Respectfully submitted,

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